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EXAMINER	
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Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Office Action Summary	Application No.	Applicant(s)	
	10/670,093	TORMASOV ET AL.	
	Examiner	Art Unit	
	Kavita Padmanabhan	2161	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

1)☒ Responsive to communication(s) filed on *03 May 2007*.

2a)☐ This action is **FINAL**. 2b)☒ This action is non-final.

3)☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

4)☒ Claim(s) *1-42* is/are pending in the application.

4a) Of the above claim(s) _____ is/are withdrawn from consideration.

5)☐ Claim(s) _____ is/are allowed.

6)☒ Claim(s) *1-19 and 24-42* is/are rejected.

7)☒ Claim(s) *20-23* is/are objected to.

8)☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

9)☐ The specification is objected to by the Examiner.

10)☒ The drawing(s) filed on *24 September 2003* is/are: a)☒ accepted or b)☐ objected to by the Examiner.

Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).

Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).

11)☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

12)☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).

a)☐ All b)☐ Some * c)☐ None of:

1.☐ Certified copies of the priority documents have been received.

2.☐ Certified copies of the priority documents have been received in Application No. _____.

3.☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

1) ☐ Notice of References Cited (PTO-892)
2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
3) ☐ Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08) Paper No(s)/Mail Date _____.
4) ☐ Interview Summary (PTO-413) Paper No(s)/Mail Date. _____ .
5) ☐ Notice of Informal Patent Application (PTO-152)
6) ☐ Other: _____.

DETAILED ACTION

Status of Claims

1. Claims 29-42 have been added

2. Claims 1, 17, 21, and 25 have been amended.

3. Claims 1-42 are pending.

4. Claims 1-19 and 24-42 are rejected.

5. Claims 20-23 are objected to.

Continued Examination Under 37 CFR 1.114

6. A request for continued examination under 37 CFR 1.114, including the fee set forth in 37 CFR 1.17(e), was filed in this application after final rejection. Since this application is eligible for continued examination under 37 CFR 1.114, and the fee set forth in 37 CFR 1.17(e) has been timely paid, the finality of the previous Office action has been withdrawn pursuant to 37 CFR 1.114. Applicant's submission filed on 5/3/07 has been entered.

Claim Objections

7. **Claims 29 and 30** objected to because of the following informalities:

The semi-colon should be changed to a period at the end of each claim.

Appropriate correction is required.

Claim Rejections - 35 USC § 103

8. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

> (a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negatived by the manner in which the invention was made.

9. This application currently names joint inventors. In considering patentability of the claims under 35 U.S.C. 103(a), the examiner presumes that the subject matter of the various claims was commonly owned at the time any inventions covered therein were made absent any evidence to the contrary. Applicant is advised of the obligation under 37 CFR 1.56 to point out the inventor and invention dates of each claim that was not commonly owned at the time a later invention was made in order for the examiner to consider the applicability of 35 U.S.C. 103(c) and potential 35 U.S.C. 102(e), (f) or (g) prior art under 35 U.S.C. 103(a).

10. **Claims 1, 3, and 9-16** are rejected under 35 U.S.C. 103(a) as being unpatentable over **Chujo et al.** (US 2002/0023156, hereinafter "Chujo") **in view of Mane et al.** (US 2005/0050107, hereinafter "Mane").

In regards to **claim 1**, **Chujo** teaches a system for implementing a data storage quota comprising:

- a computer system including a plurality of data storage devices **(Chujo, Fig. 2)** and an authentication mechanism for authorizing a plurality of users based upon at least one of a plurality of unique identifiers **(Chujo, par [0029], lines 5-7)**;
- a user group comprising a first set of users from the plurality of users, each user having a first identifier of the plurality of unique identifiers **(Chujo, par [0030], lines 17-19)**;

- a hierarchic computer file system organized on top of one of the data storage devices **(Chujo, par [0035])**, the hierarchic computer file system comprising a plurality of files, a plurality of parameters **(Chujo, par [0035])**, the parameters describing a plurality of qualitative characteristics of a level of consumption of file system resources by the plurality of users and the user group **(Chujo, par [0036] - par [0038])**;
- a quota system coupled to the hierarchic computer file system, the quota system determining a used quantitative parameter of file resource consumption that is associated with the plurality of files and can identify a total value of a set of quantitative parameters of file resource consumption for at least one of the users **(Chujo, par [0039] - par [0042])**;
- wherein the set of the quantitative parameters are marked by a set of third identifiers of the plurality of unique identifiers coupled to the used quantitative parameter of file resource consumption and to other quota parameters of the used quantitative parameter **(Chujo, par [0038] - par [0042])**.

Chujo does not expressly teach a plurality of directories and the plurality of files arranged into a plurality of trees and having a second identifier from the plurality of unique identifiers.

Mane teaches files arranged in directory trees **(Mane; par [0005], lines 1-4)**. **Mane** also teaches files being identified with directory trees and directory tree quotas **(Mane, par [0005], Fig. 4)**.

It would have been obvious to one of ordinary skill in the art at the time of the applicant's invention to implement the system of Chujo with the file and directory structure taught by Mane whereby the directory quota id could be used in the management table of Chujo as another

unique identifier in order to maintain quotas for storage resources used for storing files in selected directory trees **(Mane; par [0005], lines 1-4)**.

In regards to **claim 3**, **Chujo and Mane** teach the system of claim 1, wherein said second identifier acts as an attribute to denote belonging to at least one of said plurality of users and said user group **(Mane, par [0005], Fig. 4)**.

In regards to **claim 9**, **Chujo and Mane** teach the system of claim 1, wherein said plurality of unique identifiers can be within a context of an operating system **(Chujo, par [0004], par [0034])**.

In regards to **claim 10**, **Chujo and Mane** teach the system of claim 9, further comprising a computer network connected with said computer system and wherein said context of said operating system comprises a set of identifiers unique in said computer network **(Chujo, par [0004], par [0034])**.

In regards to **claim 11**, **Chujo and Mane** teach the system of claim 9, wherein said context of said operating system comprises a set of identifiers unique on said computer system **(Chujo, par [0004], par [0034])**.

In regards to **claim 12**, **Chujo and Mane** teach the system of claim 9, wherein said context of said operating system comprises a set of identifiers unique to an allocated area of said computer system **(Chujo, par [0004], par [0034]; Mane, Fig. 4)**.

In regards to **claim 13**, **Chujo and Mane** teach the system of claim 12, wherein said allocated area comprises a chroot environment **(Chujo, par [0004], par [0034]; Mane, Fig. 4 – obvious in UNIX OS that the allocated area could comprise a chroot environment; moreover UNIX is a chroot environment)**.

In regards to **claim 14**, **Chujo and Mane** teach the system of claim 12, wherein said allocated area comprises a virtual environment **(Mane, par [0041])**.

In regards to **claim 15**, **Chujo and Mane** teach the system of claim 1, wherein said plurality of parameters of said hierarchic computer file system comprises at least one of a consumption parameter on a size of at least one of said plurality of data storage devices associated with at least one of said plurality of users and said user group, a consumption parameter on a number of various auxiliary file system structures used to arrange files of at least one of said plurality of users and said user group, a consumption parameter on other parameters of auxiliary operations performed by an operating system to serve at least one of said plurality of users and said user group during a period of time, and a consumption parameter on a time and range of modifications of any of said above consumption parameters that allow a user to modify already defined limitations **(Chujo, par [0039] - par [0042])**.

In regards to **claim 16**, **Chujo and Mane** teach the system of claim 1, wherein said quota system can operate with said hierarchic computer file system and does not require modification of a manner in which data and file metadata are represented in said hierarchic computer file system, as well as a way of representing file system service data in said at least one of said plurality of data storage devices organized below said hierarchic computer file system **(Chujo, par [0039] - par [0042]; Mane, Fig. 4)**.

11. **Claims 2 and 4-8** are rejected under 35 U.S.C. 103(a) as being unpatentable over **Chujo in view of Mane**, further in view of **Inglett** (US 5,905,990).

In regards to **claim 2, 4, and 7**, **Chujo and Mane** teach the system of claim 1. Chujo and Mane do not expressly teach the file system having a hidden root directory that is not visible to said plurality of users and a specific data storage space mounted to an available directory area, said specific data storage area comprising a second computer file system. **Inglett** teaches creating mountpoint directories wherein files can be manifested **(Inglett, abstract)** and also teaches directories being made visible, therefore suggesting that they were previously not visible **(Inglett, col. 4, lines 39-41)**. It would have been obvious to one of ordinary skill in the art at the time of the applicant's invention to implement the system of Chujo and Mane using these feature of Inglett in order to provide added flexibility to the file system **(Inglett, col. 4, lines 29-32)**.

In regards to **claim 5**, **Chujo, Mane, and Inglett** teach the system of claim 4, wherein said second computer file system is mounted inside said available directory of said hierarchic computer file system, wherein after said second computer file system is mounted, said computer system has an opportunity to use said second computer file system as an extension of said hierarchic computer file system **(Inglett, abstract)**.

In regards to **claim 6**, **Chujo, Mane, and Inglett** teach the system of claim 4, wherein after said second computer file system is mounted, said second computer file system becomes a part of a new tree of said hierarchic computer file system **(Inglett, abstract; Mane, par [0005], lines 1-4)**.

In regards to **claim 8**, **Chujo, Mane, and Inglett** teach the system of claim 7, wherein said plurality of mounting objects comprise a plurality of file system volumes and a plurality of file system sub-trees **(Inglett, abstract; Mane, par [0005], lines 1-4, Fig. 7)**.

12. **Claims 17-19 and 24-42** are rejected under 35 U.S.C. 103(a) as being unpatentable over **Chujo in view of Mane, further in view of Inglett, and further in view of Byrnes** (US 6,832,248).

In regards to **claim 17**, **Chujo** teaches a method for implementing a data storage quota comprising:

- authorizing a plurality of users within a computer system with a plurality of unique identifiers of any context of an operating system **(Chujo, par [0029], lines 5-7)**;
- grouping a first set of users of the plurality of users in a user group, each user in the first group having at least one unique identifier **(Chujo, par [0030], lines 17-19)**;
- organizing a hierarchic computer file system on top of a data storage device, wherein the hierarchic computer file system comprises a plurality of files, a plurality of parameters **(Chujo, par [0035])**
- describing qualitative characteristics of a level of consumption of a plurality of resources of the hierarchic computer file system by at least one user and the user group via the plurality of parameters **(Chujo, par [0036] - par [0038])**; and
- calculating a used quantitative parameter of file resource consumption associated with the plurality of files **(Chujo, par [0039] - par [0042])**.

Chujo does not expressly teach arranging the plurality of files into a plurality of trees, wherein each file has at least one unique identifier to denote belonging to at least one user of the first group and to the user group, mounting a specific data storage area as a second file system inside any available directory of the hierarchic computer file system, wherein, after the mounting, the computer system can use the second file system as an extension of a new tree of the hierarchic computer file system, and informing at least one user of a total value of a set of quantitative parameters of file resource consumption using the used quantitative parameter.

Mane teaches files arranged in directory trees **(Mane; par [0005], lines 1-4)**. **Mane** also teaches files being identified with directory trees and directory tree quotas **(Mane, par [0005], Fig. 4)**.

Inglett teaches creating a mountpoint directory wherein files can be manifested **(Inglett, abstract)**.

Byrnes teaches sending a notification to a user based on quota usage **(Byrnes, Fig. 5, reference character 530)**.

It would have been obvious to one of ordinary skill in the art at the time of the applicant's invention to implement the method of Chujo with the file and directory structure taught by Mane, whereby the directory quota id could be used in the management table of Chujo as another unique identifier, in order to maintain quotas for storage resources used for storing files in selected directory trees **(Mane; par [0005], lines 1-4)**. It would also have been obvious to one of ordinary skill in the art at the time of the applicant's invention to implement the method of Chujo and Mane by using a mountpoint directory, as taught by Inglett, in an available directory of the system of Chujo and Mane in order to provide added flexibility to the file system **(Inglett, col. 4, lines 29-32)** and to incorporate the notification feature taught by Byrnes so that users could be notified of their file resource consumption information **(Byrnes, Fig. 5, reference character 530)**.

In regards to **claim 18**, **Chujo, Mane, Inglett, and Byrnes** teach the method of claim 17, wherein said calculating step further comprises:

- coupling a set of identifiers from said plurality of unique identifiers to said used quantitative parameter of file resource consumption **(Chujo, par [0036] – par [0038])**; and

- marking said set of quantitative parameters of file resource consumption with said set of identifiers from said plurality of unique identifiers and other quota parameters of said used quantitative parameter of file resource consumption **(Chujo, par [0036] – par [0038])**.

In regards to **claim 19**, **Chujo, Mane, Inglett, and Byrnes** teach the method of claim 17, wherein a set of directories within said plurality of directories comprises a plurality of mounting points of said hierarchic computer file system, wherein said plurality of mounting points are located inside said hierarchic computer file system, and wherein a file system volume and a file system sub-tree can each be used as a mounting object for said plurality of mounting points **(Inglett, abstract; Mane, par [0005], lines 1-4, Fig. 7)**.

In regards to **claim 24**, **Chujo, Mane, Inglett, and Byrnes** teach the method of claim 17, wherein said calculating step further comprises:

- releasing an allocated area size and a plurality of other data storage parameters **(Chujo, par [0039] - par [0043])**; and
- modifying said allocated area size and said plurality of other data storage parameters **(Chujo, par [0039] - par [0042], par [0064])**.

In regards to **claim 25**, **Chujo, Mane, Inglett, and Byrnes** teach the method of claim 24, wherein said releasing and modifying step comprises:

– for an operation to be performed on a file, identifying the file and which quotas are associated with that file and that operation, wherein the quotas include resource consumption parameters **(Chujo, par [0039] - par [0042]; Mane, par [0005], Fig. 4)**;

– determining unique identifiers associated with the quotas **(Chujo, par [0030], lines 17-19)**;

– determining current resource consumption parameters for the file **(Chujo, par [0038], lines 2-3, par [0040] – par [0042], par [0046])**;

– for each current resource consumption parameter, identifying a plurality of limitations associated with the current resource consumption parameters based on the quotas associated with at least one user **(Chujo, par [0040] – par [0042], par [0046])**;

– comparing the identified limitations with a current value of available resources, wherein the resources include any of a storage usage, a current state of the computer system, a current state of the hierarchic computer file system and a requested size for an allocated space and other parameters of data storage **(Chujo, par [0040] - par [0042], par [0046])**; and

– determining whether the operation can be performed, based on said comparing step **(Chujo, par [0039]; Byrnes, Fig. 5, reference character 530)**;

– executing the operation **(Chujo, par [0039]; Byrnes, Fig. 5, reference character 530)**; and

– based on the determining step, updating the current resource consumption parameter, wherein the current resource consumption parameter is stored in any of a special file, a

data storage area, a computer operating memory, and a server **(Chujo, par [0040] - par [0042], par [0046], par [0064])**.

In regards to **claim 26**, **Chujo, Mane, Inglett, and Byrnes** teach the method of claim 25, wherein said releasing and modifying steps are performed by at least one of a special program of said operating system and a kernel of said operating system **(Chujo, par [0004], par [0034])**.

In regards to **claim 27**, **Chujo, Mane, Inglett, and Byrnes** teach the method of claim 17, wherein said plurality of parameters of said hierarchic computer file system comprises at least one of a consumption parameter on a size of at least one of said plurality of data storage devices associated with at least one of said plurality of users and said user group, a consumption parameter on a number of various auxiliary file system structures used to arrange files of at least one of said plurality of users and said user group, a consumption parameter on other parameters of auxiliary operations performed by an operating system to serve at least one of said plurality of users and said user group during a period of time, and a consumption parameter on a time and range of modifications of any of said above consumption parameters that allows for use by a user to modify already defined limitations **(Chujo, par [0039] - par [0042])**.

In regards to **claim 28**, **Chujo, Mane, Inglett, and Byrnes** teach the method of claim 17, said calculating step can operate on top of said hierarchic computer file system and does not require modification of any manner in which data and file metadata are represented, as well as

any way file system service data is represented in said storage device of said hierarchic computer file system **(Chujo, par [0039] - par [0042]; Mane, Fig. 4)**.

In regards to **claim 29**, **Chujo, Mane, Inglett, and Byrnes** teach the method of Claim 17, wherein the calculating step further comprises:

- defining a sub-tree of the hierarchic computer file system that includes at least one directory and at least one file **(Mane, par [0005], lines 1-4, Fig. 7)**; and
- identifying the file as belonging to the sub-tree by analyzing a full access path to the file, based on a presence of an address of any one of the directories that includes the file and where the full access path includes a directory root **(Mane, par [0005], Fig. 7)**

In regards to **claim 30**, **Chujo, Mane, Inglett, and Byrnes** teach the method of Claim 29, wherein the calculating step further comprises associating the file with one of the unique identifiers for identifying one of the users and the user group through file ownership information stored in the hierarchic computer file system **(Chujo, par [0039] - par [0042])**

In regards to **claim 31**, **Chujo, Mane, Inglett, and Byrnes** teach the method of Claim 30, wherein the calculating step further comprises using, for the calculating step, a current value of a quantitative parameter of file resource consumption that is associated with the one of the unique identifiers **(Chujo, par [0039] - par [0042])**.

In regards to **claim 32**, **Chujo, Mane, Inglett, and Byrnes** teach the method of Claim 31, wherein the calculating step further comprises deciding whether the operating system can respond to requests that relate to the file,

wherein the deciding step is based on the current value and a value of the quantitative parameter required to respond to the requests **(Chujo, par [0040] - par [0042], par [0046])**.

In regards to **claim 33**, **Chujo, Mane, Inglett, and Byrnes** teach the method of Claim 32, wherein the requests affect the quantitative parameter, and

wherein the response to the requests may include modifying parameters of the request and parameters of a service process used by the operating system to service the request **(Chujo, par [0039] - par [0042], par [0064]; furthermore, the claim states "may include", meaning the modification of parameters is not actually required to meet the language of the claim)**.

In regards to **claim 34**, **Chujo, Mane, Inglett, and Byrnes** teach the method of Claim 31, further comprising releasing storage space, based on the quantitative parameter, for user data identified by the one unique identifier **(Chujo, par [0039] - par [0043])**.

In regards to **claim 35**, **Chujo, Mane, Inglett, and Byrnes** teach the method of Claim 31, further comprising reserving storage space, based on the quantitative parameter, for user data identified by the one unique identifier **(Chujo, par [0039] - par [0042], par [0061])**.

In regards to **claim 36**, **Chujo, Mane, Inglett, and Byrnes** teach the method of Claim 31, further comprising modifying an amount of allocated storage space, based on the quantitative parameter, for user data identified by the one unique identifier **(Chujo, par [0039] - par [0042], par [0064])**.

In regards to **claim 37**, **Chujo, Mane, Inglett, and Byrnes** teach the method of Claim 31, wherein the calculating step further comprises:

initializing the current value of the quantitative parameter to a calculated initial value of the quantitative parameter associated with the unique identifier **(Chujo, par [0058])**.

In regards to **claim 38**, **Chujo, Mane, Inglett, and Byrnes** teach the method of Claim 37, wherein the calculating step further comprises:

setting up values of usage limits for the quantitative parameter for the one unique identifier **(Chujo, par [0061, par [0065]])**.

In regards to **claim 39**, **Chujo, Mane, Inglett, and Byrnes** teach the method of Claim 38, wherein the calculating step further comprises tracking changes of a resource consumption level due to processing of the requests by the operating system **(Chujo, par [0050])**.

In regards to **claim 40**, **Chujo, Mane, Inglett, and Byrnes** teach the method of Claim 32, wherein the deciding step is performed for all requests to the operating system for file access **(Chujo, par [0050])**.

In regards to **claim 41**, **Chujo, Mane, Inglett, and Byrnes** teach the method of Claim 29, wherein the calculating step further comprises:

- releasing an allocated area size and a plurality of other data storage parameters, wherein the allocated area size is part of the quantitative parameter**(Chujo, par [0039] - par [0043])**; and
- modifying the allocated area size and the plurality of other data storage parameters; wherein the releasing and modifying steps are performed by the operating system **(Chujo, par [0039] - par [0042], par [0064])**.

In regards to **claim 42**, **Chujo, Mane, Inglett, and Byrnes** teach the method of Claim 17, wherein the quantitative parameter is stored in any of a special file and a special server **(Chujo, par [0040] - par [0042], par [0046], par [0064])**.

Allowable Subject Matter

13. **Claims 20-23** are objected to as being dependent upon a rejected base claim, but would be allowable if rewritten in independent form including all of the limitations of the base claim and any intervening claims.

Response to Amendment

14. Applicant's amendments filed 12/25/06 with respect to the 35 U.S.C. 112, 2nd paragraph rejections have been fully considered. The rejections have been withdrawn accordingly.

Response to Arguments

15. The declaration filed on 12/25/06 under 37 CFR 1.131 has been considered but is ineffective to overcome the Mane reference. The 35 U.S.C. 103(a) rejections of claims 1-19 and 24-42 are therefore maintained.

16. The affidavit or declaration must state FACTS and produce such documentary evidence and exhibits in support thereof as are available to show conception and completion of invention in this country or in a NAFTA or WTO member country (MPEP § 715.07(c)), at least the conception being at a date prior to the effective date of the reference. Where there has not been reduction to practice prior to the date of the reference, the applicant or patent owner must also show diligence in the completion of his or her invention from a time just prior to the date of the reference continuously up to the date of an actual reduction to practice or up to the date of filing his or her application (filing constitutes a constructive reduction to practice, 37 CFR 1.131).

As discussed above, 37 CFR 1.131(b) provides three ways in which an applicant can establish prior invention of the claimed subject matter. The showing of facts must be sufficient to show:

(A) > (actual)< reduction to practice of the invention prior to the effective date of the reference; or

(B) conception of the invention prior to the effective date of the reference coupled with due diligence from prior to the reference date to a subsequent (actual) reduction to practice; or

(C) conception of the invention prior to the effective date of the reference coupled with due diligence from prior to the reference date to the filing date of the application (constructive reduction to practice).

It appears as though the applicant is attempting to show (C) conception of the invention prior to the effective date of the reference coupled with due diligence from prior to the reference date to the filing date of the application (constructive reduction to practice).

17. The evidence submitted is insufficient to establish diligence from a date prior to the reference data of the Mane reference to either a constructive reduction to practice or an actual reduction to practice.

Where conception occurs prior to the date of the reference, but reduction to practice is afterward, it is not enough merely to allege that applicant or patent owner had been diligent. Ex parte Hunter, 1889 C.D. 218, 49 O.G. 733 (Comm'r Pat. 1889). Rather, applicant must show evidence of facts establishing diligence.

In determining the sufficiency of a 37 CFR 1.131 affidavit or declaration, diligence need not be considered unless conception of the invention prior to the effective date is clearly established, since diligence comes into question only after prior conception is established. Ex parte Kantor, 177 USPQ 455 (Bd. App. 1958).

What is meant by diligence is brought out in Christie v. Seybold, 1893 C.D. 515, 64 O.G. 1650 (6th Cir. 1893). In patent law, an inventor is either diligent at a given time or he is not diligent; there are no degrees of diligence. An applicant may be diligent within the meaning of the patent law when he or she is doing nothing, if his or her lack of activity is excused. Note, however, that the record must set forth an explanation or excuse for the inactivity; the USPTO or

courts will not speculate on possible explanations for delay or inactivity. See In re Nelson, 420 F.2d 1079, 164 USPQ 458 (CCPA 1970). Diligence must be judged on the basis of the particular facts in each case. See MPEP § 2138.06 for a detailed discussion of the diligence requirement for proving prior invention.

Under 37 CFR 1.131, the critical period in which diligence must be shown begins just prior to the effective date of the reference or activity and ends with the date of a reduction to practice, either actual or constructive (i.e., filing a United States patent application).

Applicant states on page 14 of applicant's remarks and in the 1.131 Declaration itself that the inventors and their attorneys were diligent in working on constructive reduction to practice of the invention between September 3, 2003 and the filing date of the present application, which is September 24, 2003. The applicant has also submitted exhibits showing emails between one of the inventors and their attorneys. However, none of the exhibits relate to the period between September 3 and September 24, 2003. Although the applicant states that telephone conversations took place during this period, no such evidence as been presented. Therefore, the evidence submitted is insufficient to establish diligence during the relevant period.

Conclusion

18. Any inquiry concerning this communication or earlier communications from the examiner should be directed to Kavita Padmanabhan whose telephone number is 571-272-8352. The examiner can normally be reached on Monday-Friday, 9:00am-5:30pm.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Apu Mofiz can be reached on 571-272-4080. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see http://pair-direct.uspto.gov. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

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